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No. 75-492

# In the Supreme Court of the United States

OCTOBER TERM, 1975

EDMUND A. ROSNER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 28a-62a) is reported at 516 F. 2d 269. The opinion of the district court (Pet. App. 1a-27a) denying petitioner's motion for a new trial is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on April 29, 1975. A petition for rehearing was denied on August 6, 1975 (Pet. App. 65a). On Au-

gust 28, 1975, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 29, 1975, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether perjury by a prosecution witness concerning the extent of the witness's own past criminal conduct, but not directly related to the defendant's guilt or innocence, requires a new trial without regard to the materiality of the perjury or its prejudicial effect.

2. Whether a new trial must be ordered because the prosecution inadvertently failed to disclose to the defense two items of information—"one very minor and one ambiguous" (Pet. App. 50a)—that might have been used at trial to impeach the character of a prosecution witness "whose character was already tarred" (*ibid.*), when the district court and the court of appeals found that petitioner was not prejudiced and that there was no significant chance that skilled counsel could have developed the information to the extent that a juror would have been led to a reasonable doubt concerning petitioner's guilt.

3. Whether a new trial must be ordered to penalize the prosecution for alleged post-trial misconduct which both courts below found did not result in any prejudice to petitioner and which the record shows was not deliberate.



## STATEMENT

1. After a jury trial on an eight-count indictment in the United States District Court for the Southern District of New York, petitioner was convicted of obstruction of justice, in violation of 18 U.S.C. 1503 and 2 (count 2), three counts of bribery of a public official, in violation of 18 U.S.C. 201(b) and 2 (counts 6 through 8), and conspiracy to commit each of those offenses, in violation of 18 U.S.C. 371 (count 1). After denying motions for a new trial, the district court sentenced petitioner to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed the convictions but vacated the sentence and remanded for resentencing (485 F. 2d 1213). Petitioner was then resentenced to concurrent terms of three years' imprisonment on each count.

On March 20, 1974, while his petition for a writ of certiorari was pending in this Court, petitioner moved in the district court for a new trial on the basis of newly discovered evidence. He alleged that the principal government witness at trial, Detective Robert Leuci, had committed perjury regarding the extent of his past criminal conduct and that the government had had prior knowledge of Leuci's undisclosed criminality.

Nearly one month later, on April 17, 1974, Leuci admitted to the United States Attorney that he had in fact committed numerous criminal acts in addition to those he had admitted at trial. Informed of this

fact by the United States Attorney, the Solicitor General thereafter filed a Supplemental Memorandum in this Court advising the Court that "recent developments suggest that the principal government witness committed perjury at the trial of this case as to collateral matters raised by the defense in an effort to impeach his credibility" (No. 73-1062, Supplemental Memorandum for the United States, p. 1). On June 10, 1974, the Court denied the petition for a writ of certiorari without prejudice to the district court's consideration of petitioner's motion for a new trial (417 U.S. 950).

In July 1974, the district judge who had presided at petitioner's trial conducted a hearing on petitioner's motion for a new trial. The court thereafter denied the motion (Pet. App. 1a-27a). The court of appeals affirmed (Pet. App. 28a-62a).

2. The facts underlying petitioner's conviction are set forth in some detail in the original opinion of the court of appeals (485 F.2d 1213, 1216-1219) and, insofar as relevant to petitioner's present contentions, in the opinions of both courts below (Pet. App. 2a-4a; Pet. App. 40a-50a).[1] In October 1971, petitioner and Nicholas DeStefano were under indictment in the Southern District of New York. Detective Robert Leuci, acting in an undercover capacity, approached DeStefano and offered, through a supposed contact in

[1] The facts are also summarized in our brief in opposition to the earlier petition filed by petitioner in this Court (No. 73-1062, pp. 4-10).



the United States Attorney's Office, to provide information about a grand jury investigation pending in the district. Petitioner later entered into negotiations with Leuci concerning his own pending case and ultimately participated in the payment of several thousand dollars to Leuci in exchange for grand jury minutes and statements of prospective government witnesses ("3500 material"). Five such payments occurred over a period of three weeks, each constituting the basis of a bribery charge in the instant case.

At trial, petitioner's defense was that he had been entrapped by Leuci and other government agents. The government's evidence consisted primarily of Leuci's testimony and tape recordings that he had made of some but not all of his meetings with Rosner.[2] On direct examination, Leuci conceded that he had engaged in four acts of prior criminal conduct; on four separate occasions between 1966 and 1968 he had arranged to sell information gathered by other detectives to persons under criminal investigation, receiving in return approximately $6,000. On cross-examination, Leuci admitted that he did not expect

[2] "Rosner was acquitted on two of [the bribery] charges relating to payments occurring on October 4th and October 8th [1971] and was convicted of three others which involved payments occurring on October 12, 13 and 19. * * * It is agreed that [Leuci] met Rosner five times. Recordings were made of the meetings on October 13th, 15th and 19th on a tape recorder concealed on the person of Leuci. The earlier meetings of October 4th and 8th were not tape recorded" (Pet. App. 34a).

to be prosecuted for these crimes. He denied additional allegations contained in police department files that he had participated in the illegal transfer of narcotics.

3. At the July 1974 hearing on petitioner's motion for a new trial, Leuci confessed to numerous criminal acts other than those to which he had testified at trial, including the furnishing of narcotics on at least one occasion to an informant, Richard Lawrence.[5] Petitioner's motion was based both on the fact of Leuci's perjury and on the contention that two specific items of newly-discovered evidence—the "Goe memorandum" and the "Leuci-Lawrence tape"—demonstrated at least some pre-trial knowledge by the government of Leuci's belatedly disclosed criminality.

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[5] The district court gave a "brief enumeration" of Leuci's newly-disclosed crimes (Pet. App. 4a-5a; footnotes omitted):

> On approximately fifteen occasions, Leuci shared with fellow police officers money seized in narcotics raids. Over a period of perhaps three years, he distributed small quantities of heroin to informants. He also took money, and occasionally, heroin, from informants in exchange for letting them continue to sell narcotics. He sold information that had been gleaned from police investigations and acted as an intermediary for other policemen who wished to make similar sales. He participated in illegal electronic surveillance on several occasions. He accepted sums of money from lawyers and, on one occasion, participated in the paying of a bribe to an Assistant District Attorney. He made payments of money to his superior officers in the Police Department. And finally, it is almost supererogatory to add that he committed perjury at the *Rosner* trial, at a trial in the New York state courts, and in numerous interviews with government prosecutors and defense lawyers.



Petitioner further claimed that following his conviction and while he was preparing his first motion for a new trial, the prosecution withheld post-trial allegations by Lawrence that he had often been given narcotics by Leuci. Petitioner also charged that the prosecutors had failed to inform the Solicitor General (and therefore this Court) of the Goe memorandum in connection with the fact of Leuci's perjury.

With respect to the Leuci-Lawrence tape, the district court found (Pet. App. 5a-7a; footnotes omitted):

> Leuci had been with the Knapp Commission, where he developed a rapport with one of the Commission's lawyers, Nicholas Scoppetta. In March of that year Scoppetta ordered Leuci to investigate the involvement of Richard Lawrence, previously identified as an informant of Leuci's, in a homicide in the Bronx. As a result Leuci tape recorded a conversation with Lawrence. The conversation yielded no information about the homicide; it did suggest, however, that both Leuci and Lawrence had participated in illegal seizures of narcotics following arrests, and that Lawrence had retained some of the narcotics ("packages") to help meet a continued need for money. The conversation * * * is neither as unequivocally inculpatory as Rosner claims nor as exculpatory as the government argues. There is no question, however, but that during the course of it Leuci demonstrates a familiarity with procedures whereby Lawrence would ob-

tain "packages" of heroin resulting from arrests. Leuci told Scoppetta of this conversation and Scoppetta subsequently listened to the tape, which he took with him when he joined the staff of the United States Attorney [in mid-1971]. The tape was, however, not disclosed to the defense prior to trial, and only came to light during the final days of the instant hearing [on the motion for a new trial], when Leuci made an inadvertent reference to it.

With regard to the Goe memorandum, the court found (*id.* at 7a-8a; footnote omitted):

> On July 13, 1972 Leuci was interviewed in the offices of the United States Attorney by two agents of the Drug Enforcement Administration (DEA), Robert Goe and Joseph Gately. He admitted to them that in 1964 and 1965 he had participated in a warrantless search for drugs along with three other government agents. No narcotics were found, but the four men did steal $200 from the premises which they divided among themselves equally. This was dutifully memorialized in what has come to be known as the "Goe memorandum". Leuci had made a similar admission in early 1971 to another DEA agent, Andrew Tartaglino, at the apartment of Edward M. Shaw, then an Assistant United States Attorney. Shaw learned of the incident shortly thereafter. The Goe memorandum, which the government concedes to have been "3500 material", was not turned over to the defense prior to trial. None of the government prosecutors who participated in the *Rosner* trial was aware



> of it until April 9, 1974, when Elliot Sagor, one of the prosecutors, learned of it.

Finally, in regard to Lawrence's post-trial allegations, the court found (*id.* at 21a-22a):

> In late December, 1972 [shortly after petitioner's trial], Lawrence went to the office of Frank Rogers, the Special Assistant District Attorney in charge of narcotics prosecutions in New York City and informed him that he had often been given narcotics by Leuci. Rogers communicated this information to the United States Attorney's Office. Robert Morvillo, then head of the Criminal Division and the government's chief trial lawyer in the *Rosner* case commenced an investigation of those charges on or about January 2, 1973. The investigation was entrusted to Charles Sherman, an agent with the Drug Enforcement Administration. Sherman and a subordinate interviewed Lawrence and were told of the many narcotics transactions in which he claimed to have participated with Leuci. Lawrence mentioned various individuals who were also party to those transactions: one named John, another named Robert, another named "Saint". Lawrence did not know the full names, addresses, or telephone numbers of any of these individuals, and DEA agents were unable to locate any of them in the ensuing weeks with the information he did provide. Lawrence was also given a lie detector test which, according to the concern which administered it, he failed. Morvillo was told of the results of the test on January 18,

> 1973 and decided to abandon any further investigation into Lawrence's allegations during the week of January 21.[4]

Although petitioner's first motion for a new trial was then pending, the prosecutor did not notify the court or the defense of Lawrence's allegations, having concluded that they were groundless.

4. The district court found, with respect to the Goe memorandum, that its nondisclosure was "inadvertent" and that the information it contained was "of no conspicuous value" (Pet. App. 13a). The court determined that "there was certainly no deliberate and carefully considered decision to suppress the information" (*id.* at 11a); moreover, "[t]he $50 incident described in the Goe memorandum" (*id.* at 12a) was of so little significance when viewed against the background of the serious criminal offenses which Leuci admitted at trial that the memorandum could reasonably have escaped even "a diligent prosecutor's attention" (*id.* at 12a).

With respect to the Leuci-Lawrence tape, the court similarly found that there was "no evidence of deliberate, considered suppression" (*id.* at 14a) and that the "dubious value" of the "ambiguous" information on the tape "could readily have escaped a prosecutor's attention" (*id.* at 15a).

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[4] Morvillo also testified that he had been informed by Sherman that Lawrence "was demanding, during this period of time, money in exchange for this information" (A. 564). "A." refers to the appendix in the court of appeals.



The district court also concluded that petitioner had not been prejudiced by these inadvertent nondisclosures (*id.* at 13a-14a):

> The unstated premise of this motion, in all its facets, is that if the *Rosner* jury had known of Leuci's other criminal activities, whether the Goe incident, the Lawrence conversation, or even the entire panoply of his crimes, his credibility would have been so severely undermined that a different verdict would have been inevitable. I cannot share this view of the evidence or of the jury's perspicacity. The trial was not a simple matching of Leuci's credibility against Rosner's; had it been, the arguments the defendant now advances would have infinitely greater persuasive force. The government's case was based on Leuci's testimony, as corroborated by several tape recordings of conversations in which Leuci and Rosner, among others, participated. Leuci was not the lynchpin of the government's case; the tapes were. * * *
>
> * * * I therefore find that no matter how much Leuci's credibility could have been undermined, whether by a single additional incident or the full range of his crimes, the jury's verdict could not possibly have been affected. * * *

The court also rejected petitioner's contention that "the 'massive' nature of Leuci's perjury, in and of itself, requires a new trial" (*id.* at 17a). The court stated (*id.* at 18a, 21a):

> The evidence newly discovered here, regardless of its extent, only serves to impeach Leuci's

credibility. It does not address the question of defendant's guilt or innocence. * * *

* * * * *

* * * Leuci's credibility was not the crux of the government's case. The jury had before it the very best evidence of Rosner's criminality—the record of his own voice and words and their intonation made in the midst of his criminal activities. Thus, even had the jury been fully apprised of Leuci's criminal background and his credibility diminished accordingly, I see no reasonable likelihood of a different jury verdict. For the tape recordings spoke far more decisively of Rosner's guilt than Leuci did.

With respect to petitioner's claims of post-trial misconduct, the district court found that, while "an experienced prosecutor is entitled to view with some skepticism the information provided by a long time narcotics informant," the prosecutor here "should * * * have realized that information supplied by Lawrence might have been of some assistance to Rosner in substantiating the contentions advanced in the motion [for a new trial]" (*id.* at 23a). "But even so," the court stated, "I fail to see how it could avail Rosner. The simple fact is that he was in no way prejudiced. All that resulted was the denial of a new trial motion; Rosner has now had another opportunity to move for a new trial, and to include in such motion all of the charges of what the government failed to apprise him in January, 1973" (*ibid.*).



Similarly, the court could "see no prejudice to Rosner" (*id.* at 25a) from the prosecutors' failure to make specific mention to the Solicitor General of the Goe memorandum. "The incident described in the Goe memorandum was trivial in comparison to the other crimes to which Leuci confessed. His overall confession was brought to the attention of the Supreme Court, and I therefore fail to see how the addition of a single minor item to the list of Leuci's sins could have produced a different result in that Court" (*id.* at 25a-26a).

5. The court of appeals upheld the district court's finding that the prosecution's nondisclosure of the Goe memorandum and the Leuci-Lawrence tape was inadvertent (Pet. App. 37a). It also agreed that there was no "significant chance that skilled counsel could have developed the evidence of Leuci's criminality contained in the Leuci-Lawrence tape and the Goe memorandum to impeach his credibility to the extent that a juror would be led to reasonable doubt about Rosner's guilt" (*id.* at 38a). The court stated (*id.* at 38a-39a; footnote omitted, emphasis in original):

> We are not dealing here with government nondisclosure of direct, exculpatory evidence. * * * Nor are we dealing with perjury and government suppression of information that vitally concerns the motivation of the witness, such as evidence about consideration promised him by the prosecutor for his testimony. * * * In this case there is no question of a concealed promise of immunity: Leuci told the jury that he did not expect to go to jail for his crimes.
>
> * * * * *

> The sole issue before us is whether *additional* evidence tending *further* to impeach the credibility of a witness whose character had already been shown to be questionable, admissible only in the court's discretion, might have induced a juror who had no reasonable doubt of Rosner's guilt, to have such doubt. * * *

After an exhaustive review of the tape recorded conversations involving petitioner and Leuci, which had been introduced at petitioner's trial (and which the court of appeals panel listened to in the presence of counsel), the panel concluded, as had the district court, that "the tapes [were] the strongest evidence against the credibility of [petitioner's] story" that he had been entrapped (*id.* at 50a). The court of appeals stated (*ibid.*):

> In view of the evidence therein presented, it strikes us as highly unlikely [4a] that the shift in the trial equation produced by two additional pieces of impeachment information, one very minor and one ambiguous, aimed at a witness whose character was already tarred, would have been sufficient to change the result. We conclude that these items, no matter how skillfully used by defense counsel, would not have so altered a juror's perception of Leuci's credibility as to induce reasonable doubt of Rosner's guilt on the basis that he had been entrapped.

The court of appeals, like the district court, rejected the contention that Leuci's perjury at the trial

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[4a] In the appendix to the petition the word is "likely," but in the court's opinion as filed and published the word is "unlikely" (516 F.2d at 278).



by itself requires a new trial without regard to prejudice. The court agreed that "the perjury was unrelated to the issues being tried and was related, on the contrary, only to collateral and cumulative impeaching material concerning the witness' own past misconduct" (*id.* at 53a).

The court of appeals also agreed with the district court that "the prosecutor should not have made a unilateral determination of the credibility of Lawrence when what Lawrence was alleging fitted into the very pattern of conduct suggested by [petitioner's] motion [for a new trial]" (*id.* at 57a) but that petitioner was not prejudiced by that post-trial nondisclosure. "Since Judge Bauman, after hearing the Lawrence story, decided against [petitioner], it is hard to see why the same judge, hearing the same story, would have decided it differently at an earlier time" (*ibid.*).

The court assumed *arguendo* that the prosecutors should have informed the Solicitor General specifically of the Goe memorandum at the time of the earlier petition for a writ of certiorari, but it concluded that the omission was not prejudicial to petitioner because it did not affect the result. "The Supreme Court, in its denial of certiorari, specifically preserved the new trial motion for hearing on the basis of the Solicitor General's disclosure. * * * We do not believe that the Supreme Court with all the facts now before us would have granted a new trial rather than a hearing to [petitioner]" (*id.* at 59a-60a).

## ARGUMENT

1. Petitioner contends (Pet. 33-35), relying on *Mesarosh* v. *United States*, 352 U.S. 1, that Leuci's perjury at trial concerning the full extent of his past criminal conduct requires a new trial without regard to whether it resulted in prejudice to petitioner. As the court of appeals correctly concluded, however, *Mesarosh* did not establish a general rule requiring a new trial whenever it appears that an important government witness committed perjury, regardless of its materiality to the question of guilt or innocence (Pet. App. 53a):

> *Mesarosh* involved that rare situation where a key witness [in a Smith Act case] who was accusing people of Communist affiliations had been conceded by the government to have testified against others in a Senate investigation in such a bizarre fashion as to raise the inference that he was either an inveterate perjurer or a disordered mind. His suspected perjury, it must be noted, was not with respect to his own past. He was a professional witness who was identifying many persons as directly involved in Communist activities.

Here, as the court of appeals found, Leuci's "perjury was unrelated to the issues being tried and was related, on the contrary, only to collateral and cumulative impeaching material concerning the witness' own past misconduct" (*ibid.*). This Court in *Mesarosh* distinguished the situation there from precisely the kind of situation involved here—where a motion



for a new trial is based on newly discovered evidence which bears on the credibility of a prosecution witness's trial testimony but "which is 'merely cumulative or impeaching' " (352 U.S. at 9). There is no reason here to require a new trial without first considering the materiality of the perjury and the prejudice, if any, to petitioner.

2. Petitioner argues (Pet. 35-43), however, that the court of appeals applied an incorrect standard in assessing the prejudicial impact of Leuci's perjury and of the prosecution's inadvertent nondisclosure of the Goe memorandum and the Leuci-Lawrence tape. The contention rests on an inaccurate characterization of the standard applied by the court of appeals.

Petitioner asserts that the court of appeals required him "to sustain the burden of proving that a juror positively '*would be led* to reasonable doubt about Rosner's guilt' " (Pet. 40; emphasis in original). The test actually used by the court of appeals, however, was "whether there is a *significant chance* that skilled counsel could have developed the [additional] evidence of Leuci's criminality * * * to impeach his credibility to the extent that a juror would be led to reasonable doubt about Rosner's guilt" (Pet. App. 38a; emphasis added). The court did not require proof that "a juror *positively*" would be led to reasonable doubt (Pet. 40; emphasis added). It would have been enough in the court's view if the additional evidence "*might* have induced a juror who had no reasonable doubt of Rosner's guilt, to have such doubt" (Pet. App. 39a; emphasis added).

Petitioner repeatedly stresses (Pet. 36, 37, 38, 40) the court's statement that "the standard demands more than the possibility of a different result upon retrial" (Pet. App. 38a). But he overlooks the sentence immediately following that statement, which explains what the court meant by "possibility" and which drains the clause of the meaning petitioner attributes to it. The court stated: "Any piece of new evidence might, in theory, alter the course and outcome of a trial, but a case is not automatically remanded whenever such new evidence emerges" (*ibid.*).

All that the court intended was that a merely theoretical possibility of a different result, present in every case in which any new evidence is discovered, would not suffice to require a new trial. Only when there is "a *significant* chance" (*ibid.*; emphasis added) of a different result—that is, when the particular facts of the case suggest some reasonable possibility (beyond a purely theoretical possibility) of a different result—is a new trial required. Thus, the standard that petitioner endorses—whether there is a "reasonable possibility" or a "reasonable likelihood" that the jury's verdict might have been affected by Leuci's perjury and the inadvertent nondisclosures (see Pet. 37, 38, 40)—is simply a reformulation of the standard applied by the court of appeals.[5]

[5]Petitioner argues that the court improperly imposed the burden of proof in this regard on him rather than the government (Pet. 37). Even if the single conclusory phrase on which petitioner relies has the significance he seeks to give it, however, the court of appeals' decision rests not on a technical allocation of the burden of proof but on the explicit finding, based on a thorough review of the extensive record, that the additional evidence "would not have so altered a juror's perception of Leuci's credibility as to induce reasonable doubt of Rosner's guilt on the basis that he had been entrapped" (Pet. App. 50a). There is no indication that the court would have reached a different result if the burden had been on the government.



In any event, this is not an appropriate case in which to consider the precise formulation of an appropriate standard for determining the prejudicial impact of perjury by a prosecution witness or inadvertent nondisclosure of information by a prosecutor, for petitioner was not prejudiced under any formulation of the test. The district court found—and the court of appeals did not disturb the finding—that "no matter how much Leuci's credibility could have been undermined, whether by a single additional incident or the full range of his crimes, the jury's verdict could not possibly have been affected" (Pet. App. 14a; see also *id.* at 17a, 21a).[6]

Petitioner's contentions reduce, in the end, to an attack on the findings of the district court and the court of appeals. He asserts that "there is at the very

[6]There is consequently no need to hold this petition pending a decision in *United States* v. *Agurs*, No. 75-491, certiorari granted, November 17, 1975. The issue in *Agurs* is whether the prosecution's good faith failure in a murder trial to disclose the prior criminal record of the decedent, in the absence of a defense request for the information, constitutes a deprivation of due process and requires a new trial if, as the *Agurs* panel concluded, "the undisclosed evidence * * * '*might* have led the jury to entertain a reasonable doubt about

least a 'reasonable likelihood' that some of the jurors would have been influenced by the destruction of Leuci's credibility and that disclosure to the jury of the truth about Leuci '*could* . . . have affected the judgment of the jury' " (Pet. 40; emphasis in original). That factual issue was resolved against petitioner by both courts below after exhaustive evidentiary inquiry. There is no need for further review.

3. Petitioner contends (Pet. 24-32) that a new trial should be ordered because of what he calls the prosecution's "deliberate post-trial misconduct" (Pet. 24) in failing to disclose to the district court the substance of the Lawrence allegations and failing to apprise the Solicitor General specifically of the Goe memorandum and the Leuci-Lawrence tape. Petitioner does not challenge the findings of both courts below that he was in no way prejudiced by the alleged "misconduct." He argues instead that a new trial should be ordered solely to penalize the prosecution.

a. Petitioner's imputation of deliberate misconduct to the prosecutors is supported neither by the findings

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appellant's guilt' " (*Agurs* Pet. App. 11a; emphasis added). Although our petition in *Agurs* suggested (p. 13) that the court's application of a reduced standard of materiality in the absence of prosecutorial misconduct conflicted with (among other decisions) the decision of the court of appeals in the present case, the finding of the district court here—that "the jury's verdict could not possibly have been affected" (Pet. App. 14a)—would satisfy even the standard applied by the District of Columbia Circuit in that case. Thus, even if this Court were to uphold the decision of the court of appeals in *Agurs*, that would not affect the proper disposition of the present petition. (We have sent petitioner's counsel a copy of our petition for a writ of certiorari in *Agurs*.)



below nor by the evidence. The court of appeals concluded that the prosecution had "erred seriously" in making "a unilateral determination of the credibility of Lawrence" and in failing to recognize that Lawrence's allegations, whatever their merit, might have been useful to the defense in its first motion for a new trial (Pet. App. 57a; see also *id.* at 23a). But to say that the prosecutor made a serious error of judgment does not imply that he deliberately and in bad faith withheld information that he believed was material. To the contrary, the evidence is wholly inconsistent with any such claim.

Confronted with Lawrence's allegations, the prosecutor took steps to attempt to verify them, directing agents to investigate the leads provided by Lawrence and obtaining Lawrence's consent to taking a polygraph test. The investigation failed to substantiate the allegations, and the results of the polygraph test indicated that Lawrence was lying. The prosecutor thereafter abandoned the investigation, having concluded that the allegations were baseless (A. 564-565, 574). He testified that he did not understand there to be any legal obligation to reveal to the defense the substance of the meritless allegations (A. 563-566, 569-571, 588, 590, 596-597). Cf. *Moore* v. *Illinois*, 408 U.S. 786, 795; *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135, 138 (C.A. 2). Whether or not he was correct in that judgment, there is nothing to suggest that it was a "calculated" (Pet. 25) decision to suppress material information.[7]

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[7] Petitioner belittles the prosecutor's investigation (Pet. 15-16). While the district court found it unnecessary to con-

b. Even less did the prosecutors deliberately withhold evidence from this Court that they had reason to believe "could have affected the outcome of the [certiorari] petition" (Pet. 24). They did not become aware of the Goe memorandum until April 1974, when petitioner's application for certiorari and his new trial motion were both pending. Assistant United States Attorney Sagor realized that the memorandum was "3500 material" that should have been turned over to the defense at trial; he advised chief appellate attorney Gordan of the memorandum and of his intent to give it to the defense in connection with the new trial motion (A. 1090). At about the same time, Sagor learned of the Leuci-Lawrence tape, in which "Leuci demonstrates a familiarity with procedures whereby Lawrence would obtain 'packages' of heroin resulting from arrests" (Pet. App. 7a) but which leaves unclear whether Leuci had given drugs to Lawrence. A transcript of the tape was prepared

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sider the adequacy of the investigation, it noted that "an experienced prosecutor is entitled to view with some skepticism the information provided by a long time narcotics informant" (Pet. App. 23a). Moreover, petitioner's "failure to call Lawrence to testify scarcely bespeaks unbounded confidence in the quality of his testimony. It also tends to undermine the defense contention that Lawrence's information was of such singular value that the government prosecutors should have investigated it more thoroughly" (*id.* at 24a). Indeed, since petitioner offered no evidence either to support Lawrence's allegations that Leuci had engaged in narcotics transactions or to substantiate the value of any of the "leads" provided by Lawrence to the investigators, there is nothing in the record to contradict Leuci's testimony (A. 393, 499) that Lawrence's allegations were fabricated.



specifically with a view to rebutting Lawrence's anticipated testimony at the new trial hearing that Leuci had been giving him large quantities of drugs at about the time of the taped transaction (A. 1253-1254). Within a week, however, both the memorandum and the tape were dwarfed in significance by Leuci's revelations of perjury and large-scale prior misconduct. The United States Attorney thereupon informed the district court that *Leuci* had admitted to additional misconduct. Gordan shortly thereafter notified the Solicitor General's office, and the Solicitor General informed this Court, of the fact and nature of Leuci's perjury.

Petitioner's claim (Pet. 22-23) that the prosecutors deliberately misled the Solicitor General—and thereby this Court—by notifying him of Leuci's perjury but withholding mention of the Goe memorandum and Leuci-Lawrence tape (both assertedly indicating government pretrial "aware[ness] of some of Leuci's undisclosed criminality" (Pet. 22)) is groundless.[8] Gordan testified that he never thought "about the Goe memorandum in connection with any communications with the Solicitor General with regard

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[8] Contrary to petitioner's suggestion (Pet. 24), the court of appeals "assumed" only for the sake of argument that the prosecutors "should have specifically told the Supreme Court of the Goe Memorandum and the circumstances surrounding it as evidence of the government's knowledge of it during trial" (Pet. App. 58a). Indeed, the court used the quoted language merely in reciting petitioner's contention. Petitioner did not contend in either court below that the prosecution should have notified this Court specifically of the Leuci-Lawrence tape (see Pet. App. 24a; Pet. App. 57a).

to Leuci's [admissions]" (A. 1087-1088). He had regarded Leuci's 1964 appropriation of $50 as of "little significance" compared to Leuci's other confessed crimes (A. 1067). Indeed, Leuci maintained even after his confession of perjury that he had merely forgotten the Goe incident at trial (A. 1048). As for the Leuci-Lawrence tape, the prosecutors did not believe that it evidenced government pretrial knowledge of criminal conduct specifically involving Leuci, a belief that the courts below later found justified (see Pet. App. 15a, 16a, 51a, n. 4).

Thus, the prosecutors concluded that their duty was to notify this Court of the central fact that the government's principal witness had committed perjury at trial in matters affecting his credibility. They saw no reason at the time to apprise the Solicitor General specifically of the Goe memorandum and Leuci-Lawrence tape. In light of Leuci's admission to the prosecutors that he had engaged in numerous acts of criminal misconduct other than those to which he had testified at trial, the information on the memorandum and the tape must have seemed then, as it does now, to be of little additional significance. Those items were to be presented to the district court in connection with petitioner's pending motion for a new trial, and that court was plainly the proper forum to consider in the first instance whether and to what extent those items were relevant to petitioner's motion.

In any event, if there was fault in the prosecutors' failing to apprise this office of those two items, it



was one of judgment, not of motive. There is simply no foundation for petitioner's assertion that the prosecutors "made a series of premeditated and strategic decisions * * * intentionally to withhold undeniably relevant information from the courts" (Pet. 29).[9]

c. It follows that the premise of petitioner's contention—that "deliberate post trial misconduct" (Pet. 24) requires a new trial even if the defendant suffers no prejudice—is inaccurate. Even if deliberate prosecutorial misconduct would warrant a new trial

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[9] Petitioner contends (Pet. 30-31, n. **) that additional evidence that came into his possession only after the denial of his latest new trial motion establishes that the prosecutors "had actual pre-trial knowledge of Leuci's participation in yet another serious crime which was not reve[al]ed at either the trial or the instant new trial hearing" (Pet. 31, n. **), namely, an illegal electronic surveillance in 1971. Petitioner presented this contention to the court of appeals by letter during the pendency of his appeal. The government submitted a reply supported by affidavits which stated that, contrary to petitioner's present assertion, petitioner's counsel knew of the substance of Leuci's involvement in the electronic surveillance before the new trial hearing and could have presented the matter to the district court for specific findings of fact. The government also submitted that the act in question involved Leuci's gathering of evidence with the knowledge of the government as part of an investigation of illegal activity by other police officers. The court of appeals treated petitioner's newest submission as a motion for reconsideration of its decision denying him rehearing, and it denied the motion (Pet. App. 65a).

irrespective of prejudice,[10] there was no such misconduct in this case.

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[10] Petitioner argues that granting a new trial is the only "effective remedy for deliberate post-trial misconduct by government attorneys" (Pet. 24) and that a failure to order a new trial in such circumstances would mean that "there can *never* be any remedy for post-trial suppressions, regardless of how deliberate or serious they may be" (*ibid.*; emphasis in original). If a prosecutor engages in deliberate misconduct, however, he may be subject to professional disciplinary proceedings. See American Bar Association, *Code of Professional Responsibility*, Disciplinary Rule 7-102 (1971). We question the appropriateness of granting a new trial, in the absence of prejudice to the defendant, solely to penalize the prosecutor, for it is less the prosecutor than the criminal justice system and the public that would suffer the penalty. We do not see the wisdom in fashioning so drastic a "remedy" to correct a wrong not affecting the defendant's right to a fair trial.

*United States* v. *Ott*, 489 F. 2d 872 (C.A. 7), on which petitioner relies, does not support his contention. The court there reversed a conviction and remanded for a new trial upon a finding of deliberate prosecutorial misconduct at trial as well as on appeal. The defendant at trial sought by cross-examination to show that a principal prosecution witness was a government informer. The prosecutor objected to the questions, denied that the witness was a government informer, and offered to present evidence to support his denial. The trial court sustained the prosecutor's objection. The witness was in fact a government informer. The court of appeals found that, although appellate counsel for the government knew that trial counsel had misled the trial court, he failed to disclose that fact to the court or to defense counsel except in response to questions at oral argument. The court of appeals viewed as "deliberate the prosecutor's misstatement, his offer to produce inaccurate testimony, and his failure to correct his own misrepresentation" (489 F. 2d at 875; footnote omitted).

Petitioner says that the court in *Ott* reversed the conviction "despite the conceded fact that the defendant had not been specifically prejudiced by the suppression" (Pet. 26). But, while the court agreed that "proof that [the witness] was an informant would not have been sufficient to demonstrate [the defendant's claim of] entrapment" (489 F. 2d at 875, n. 6), it nevertheless found that the defendant may have been prejudiced. The court stated: "[I]f defendant had obtained a favorable ruling in connection with the dispute over [the witness's] status, he might have elected to testify and we have no way of evaluating the strength of the entrapment defense which might have been supported by that testimony buttressed by a correct description of [the witness's] relationship to the government" (*ibid.*).

*Ott* thus does not stand for the proposition for which petitioner cites it, and the decision does not conflict with the present case. Not only is there no finding here of deliberate prosecutorial misconduct, but also both courts below found that petitioner was not prejudiced by the alleged "suppression" of information.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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